

No. 86-1645

Supreme Court, U.S.

E I L E D

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IN THE  
**Supreme Court of the United States**

October Term, 1986

LUIS I. BATAYOLA,  
*Petitioner,*

v.

MUNICIPALITY OF METROPOLITAN SEATTLE,  
a municipal corporation,  
*Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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May 13, 1987

**RESTATEMENT OF QUESTION  
PRESENTED FOR REVIEW**

Whether, under the Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026, a part-time bus driver is entitled to back pay because he missed an opportunity to take a test to become a full-time bus driver while on military leave.

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**OPINIONS BELOW**

Respondent accepts the statement of Petitioner.

**JURISDICTION**

Respondent accepts Petitioner's statement of jurisdiction but denies Petitioner's claim that the issues raised by him comply with the standards of Supreme Court Rule 17.

**STATUTES INVOLVED**

Respondent accepts the statement of Petitioner.

## STATEMENT OF THE CASE

### 1. Course of Proceedings.

This case arose when the Municipality of Metropolitan Seattle ("Metro") refused to allow Luis I. Batayola, a part-time bus driver, to apply for a transfer to a full-time driver's position when Batayola returned from military reserve training. On October 26, 1984, Batayola filed a complaint against Metro seeking retroactive seniority, status, and pay as a full-time bus driver from the date he contended he should have been made a full-time driver. ER 3-5.<sup>1</sup> Metro answered and, after discovery, moved for summary judgment. Batayola did not file a cross-motion for summary judgment.

The district court granted Metro's motion for summary judgment. In doing so, it ruled that "[t]he transfer involved is not covered by the Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026 [the "Act"], because it was not given automatically and solely by virtue of continuous employment." *Batayola v. Municipality of Metropolitan Seattle*, No. C 84-1475, slip op. at 4 (W.D. Wash. April 26, 1985) (Petition A-23).

Batayola appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the decision of the District Court, holding that Batayola did not have a right to the full-time bus driver's position because, under the particular facts of his case, selection for that position "was based on the applicant's fitness and ability" involving "[s]ubstantial employer discretion[.]" *Batayola v. Municipality of Metropolitan Seattle*, 798 F.2d 355, 357 (9th Cir. 1986).

<sup>1</sup> "ER\_\_\_\_" refers to pages in the Excerpts of Record; "SER\_\_\_\_" refers to pages in the Supplemental Excerpts of Record.

## 2. Pertinent Facts.

Metro is a municipal corporation operating the public transportation system in King County, Washington (including Seattle). Metro has over 1,100 full-time and 800 part-time bus drivers in its employ.

Luis I. Batayola joined Metro as a part-time bus driver, working one and one-half hours a day, five days each week, driving a bus once each day over the same street route. ER 47-48. As soon as he became a part-time driver, Batayola applied to transfer to a full-time position. For reasons not relevant to this action, he was not then selected.

Batayola subsequently applied for and was granted a leave of absence from his part-time position, to perform his reserve duties for the Marine Corps. He began his leave on February 16, 1982 and returned to Metro on March 18, 1982. It is undisputed that Batayola resumed his position as a part-time transit operator with the same seniority, vacation, and pay status he would have had in that position had he remained continuously employed and not taken his military leave.

While Batayola was on military leave, Metro advertised for applicants to become full-time drivers from among its part-time drivers. ER 2. Upon his return from leave, Batayola attempted to apply for a full-time position, but by that time the application period had closed and the selection process was well under way. Metro refused to accept Batayola's application. ER 2.

The position for which Batayola applied is not available to part-time bus drivers based on their seniority at Metro. Instead, applicants for transfer to the full-time driver position must successfully complete a three-step process.



First, applicants submit a form to their Base Chief, who completes each application by filling out a performance evaluation covering three categories: attendance record, accident record, and disciplinary action record. ER 38-39, 28. Infractions in each category are ranked based on seriousness, then tabulated and subtracted from the applicant's experience points, which are earned at the rate of one point for each month of service. ER 28. The completed application is then reviewed with the applicant for accuracy.

Second, applicants take a video test. All 426 applicants in the February 1982 group took a video test, which presented 65 vignettes and required the applicant to respond to the situation presented in the vignette. These tests were scored and the results averaged with the score derived from the performance evaluation. Each applicant was ranked by composite score. ER 28-29.

Metro selects the top ten to twenty percent of the applicants. In 1982, the list contained 105 names. Those who were eliminated were eliminated solely on the basis of their composite scores. ER 29.

Third, the final group undergoes two series of interviews. In the first series, the applicant's response to stressful situations is evaluated by an Employment Assistant, who also evaluates the applicant's appearance and demeanor. Only those who receive a positive evaluation are interviewed a second time.

During the second series of interviews, three Base Chiefs, who work closely with transit operators on a daily basis, interview the applicants to evaluate subjectively whether the applicant would likely perform satisfactorily on the job. ER 43, 29-30. In the application process that Batayola missed, this three-step process screened out 44 applicants who had greater seniority than Batayola. SER 1.

The names of applicants who survive this three-step process are placed on a final list, which only then is sent to the employee's labor union to be arranged in order of each applicant's seniority as a part-time bus driver. ER 30. The most senior applicants then undergo an additional five days of training to learn additional routes and other information necessary to perform the duties of a full-time driver. Only when the applicants successfully complete the five-day program do they become full-time bus drivers. ER 36.

### REASONS FOR DENYING THE WRIT

1. **There is No Split of Authority Among the Circuits on the Standard to be Used in Determining Whether an Employment Opportunity is Subject to the Protection of the Act.**

Batayola has not shown any reason for this Court to exercise its certiorari jurisdiction. This is the first decision to address the particular issue raised in this case, *viz.*, whether a returning veteran must show that he or she would have received the missed employment opportunity if employment would have been continuous. As a result, the Court of Appeals' decision does not conflict with the decision of any other court.

The decision of the Court of Appeals is, however, consistent with a uniform line of cases that set out the general standard by which courts determine whether a veteran's claim to a benefit is protected by the Act:

If a benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant

contingency, or if the benefit is in the nature of a short-term compensation for services rendered, it is not an aspect of seniority within the coverage of [the Act].

*Alabama Power Co. v. Davis*, 431 U.S. 581, 589 (1977) (veteran entitled to credit toward pension for period of military service where pension functions as reward for continuous service); see *Foster v. Dravo Corp.*, 420 U.S. 92, 100 (1975) (veteran not entitled to vacation benefits where benefits conditioned on work actually performed); *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169, 173-74 (1964) (veteran entitled to upgraded seniority date he would have achieved but for military service where upgrade depended only on completion of specified work period); *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 272 (1958) (veteran cannot be reassigned to a position higher than he formerly held where promotion depends on employer discretion and not automatic progression).

Batayola does not question the central holding of this case, that a returning veteran must show that the missed opportunity to transfer would have occurred if employment would have been continuous. Instead, Batayola asserts that he was denied an incident of employment when he lost the opportunity to apply for the full-time bus driver's position because he was away on military leave.

Batayola's position misses the point. Metro does not dispute that it took applications for full-time bus driver positions during the time that Batayola was on military leave. Nor does it dispute that Batayola might have applied for the position if he had not been on military leave. Batayola was unable to show, however, that the position he sought would have been his solely by virtue of his continuous employment. As this Court stated in *McKinney*,

Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. The statute does not envisage overriding an employer's discretionary choice by any such promotion.

*McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. at 272. Because the undisputed facts showed that the applicant's successful transfer from a part-time to full-time driver's position was based on fitness and ability, and not on continuous employment, Batayola's claim must fail.

## 2. This Case Does Not Have Widespread Significance.

The Court of Appeals limited its holding to the facts of the case before it, making it unlikely that this case will have the widespread significance that Petitioner predicts (the issues raised will affect the "rights of the approximately 1,650,000 members of the Ready Reserve Components of the U.S. Armed Forces"). See Petition at 18.

In reaching the decisions, both the District Court and the Court of Appeals focused on the application process, which included performance evaluations, situational response video tests, and personal interviews. *Batayola*, 798 F.2d at 356. Both courts concluded that the particular process showed that the transfer Batayola sought as a matter of right depended more on fitness and ability than on continued employment. The opinions make clear that had a different process been at issue, the decision could have been different. As a result, this particular case will not have widespread significance.

**3. Batayola Misstates the Issue Before this Court by Separating the Issue of Liability for a Violation from the Issue of Remedy for a Violation.**

Batayola argues that the Court of Appeals should have separated the issue whether Metro denied Batayola a right covered by the Act when it refused to reopen its application process from the issue whether Batayola is entitled to the full-time position as a remedy for Metro's violation. Because he was refused the opportunity to apply, Batayola contends he should receive the position he desires. These issues cannot be separated in the way Batayola suggests.

Instead, courts must first determine whether the benefit sought by the veteran is one that is covered by the Act. Many opportunities may be missed in the course of a veteran's employment that are not covered by the Act. A veteran may miss an opportunity because he or she is ill, on vacation, or simply does not see the opportunity posted. The Act does not cover such situations. Similarly, positions for which the veteran is patently unqualified may be posted while a veteran is on military leave. A mechanic may miss the opportunity to become a senior manager, a filing clerk may miss the opportunity to become staff counsel. The Act does not cover such situations.

Nobody would seriously argue that the mechanic should be made a senior manager or that the filing clerk should be made staff counsel. Instead, the court must first decide whether the benefit claimed by the veteran is one covered by the Act. This is precisely the analysis used by the Court of Appeals in this case, following the standards set out by this Court in *Alabama Power Co.* and its progeny.

**4. Batayola's Legal Arguments Ignore the Facts of this Case.**

Batayola asserts that he has been denied his seniority rights by Metro's refusal to allow him to apply for a full-time position upon his return from reserve training. Petition at 15. But the facts of this case do not support the argument. It is undisputed that Metro restored Batayola to the same position, with the same seniority, vacation, and pay status as he would have had in that position had he remained continuously employed.

Nor should this Court accept Batayola's assumption that he would have passed the test in 1982 had Metro given him the opportunity. Seniority itself is a factor in the first part of the test, where each applicant gains one experience point for each month of service. ER 28. By 1983, when he did take the test, Batayola had not only a year's more seniority, which should have aided him on part one of the application process, but also added experience driving a bus, which should have aided him in parts two and three of the application process. In short, even if the 1982 and 1983 tests were identical (they were different in some particulars), Batayola's ability to pass the test had most likely increased in the interim.

**5. The Court of Appeals Correctly Decided that Batayola Could Not Show with Reasonable Certainty that He Would Have Passed the Test to Become a Full-time Driver.**

The undisputed facts show that there was no reasonable certainty that Batayola would have transferred to a full-time bus driver's position had he been continuously employed by Metro.



The intent of the Act was to give returning veterans only employment rights, including advancements and promotions, that they could reasonably anticipate at the time of their induction into military service.

*Cox v. International Longshoremen's Association, Local 1273*, 343 F. Supp. 1292, 1300 (S.D. Tex. 1972), *aff'd*, 467 F.2d 1287 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973). In determining whether a reasonable certainty exists, this Court has held that the Act allows only limited uncertainties to be disregarded when determining coverage under the Act.

In every veteran seniority case the possibility exists that work of a particular type might not have been available; that the veteran would not have worked satisfactorily during the period of his absence; that he might not have elected to accept the higher position; or that sickness might have prevented him from continuing his employment.

*Tilton*, 376 U.S. at 180-81.

The type of uncertainty envisioned by *Tilton* is simply not present in this case. Here, it is undisputed that Batayola could not know, at the time he left for military service, that he would be offered a full-time bus driver's position. At that time, he had not taken the situational response video test, which only 25% of the applicants survived. In addition, he had not undergone the two series of subjective interviews, nor the training required of every applicant before he or she can be accepted as a full-time bus driver.

Because the position sought was not given as a reward for Batayola's length of service, Batayola could not reasonably anticipate that he would be able to successfully transfer to a full-time bus driver's position at the time he left for reserve training. As a result, he was not entitled to the benefit he sought.

CONCLUSION

For the reasons stated above, Respondent submits that there is no reason for this Court to exercise its certiorari jurisdiction. The Petition for Writ of Certiorari should be denied.

DATED this 13th day of May, 1987.

Respectfully submitted,

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